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No. 97-634

In the Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

RONALD R. YESKEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the exclusion of a state prisoner from a program of a state prison agency on the basis of disability may constitute a violation of the anti-discrimination provision of Title II of the Americans with Disabilities Act, 42 U.S.C. 12132.

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INTEREST OF THE UNITED STATES

The Department of Justice has responsibility for the enforcement and implementation of Title II of the Americans with Disabilities Act (ADA). 42 U.S.C. 12133, 12134. Because petitioners contend that Title II does not apply to a State's treatment of its prisoners, and that such an application would be unconstitutional, this case may affect the Department of Justice's ability to enforce Title II in the context of state prisons.

STATEMENT

1. Congress enacted the Americans with Disabilities Act (ADA) in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). An exercise of the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," *ibid.*, the ADA broadly covers, and prohibits discrimination in, both private and public activity,

including employment (42 U.S.C. 12111-12117), public accommodations (42 U.S.C. 12181-12189), public transportation (42 U.S.C. 12141-12150) and, as relevant here, the full range of activities conducted by public entities (42 U.S.C. 12131-12134). Federal agencies are given a leading role in implementing and enforcing the ADA, in light of Congress's declared purposes to "provide clear, strong, consistent, enforceable standards addressing discrimination" against the disabled and to "ensure that the Federal Government plays a central role in enforcing" those standards on behalf of the disabled. 42 U.S.C. 12101(b)(2) and (3).

This case involves the anti-discrimination provision of Part A of Title II of the ADA, 42 U.S.C. 12132, which prohibits discrimination on the basis of disability by public entities. Section 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Title II defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" for actions brought under Section 504 shall be available to any person alleging discrimination in violation of Title II. 42 U.S.C. 12133; see also 42 U.S.C. 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement Title II, and requires those regulations

to be consistent with pre-existing federal regulations that coordinated federal agencies' application of Section 504 to recipients of federal financial assistance, and interpreted certain aspects of Section 504 as applied to the federal government itself. 42 U.S.C. 12134(a) and (b). Title II thus extended Section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance.[1]

2. The Department of Justice has promulgated regulations for the implementation of Title II. 28 C.F.R. Pt. 35. Consistent with the legislative finding that discrimination against the disabled "persists in such critical areas as * * * institutionalization," 42 U.S.C. 12101(a)(3), those regulations provide for the application of Title II's anti-discrimination rule to state prisons. The regulations first state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. 35.102(a). The preamble to the regulations indicates that this language was intended to apply to "[a]ll governmental activities of public entities," *i.e.*, "anything a public entity does." 28 C.F.R. Pt. 35, App. A, at 466. Section 35.190(b)(6) designates the Department of Justice as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administra-

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[1] See S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (Senate Report) ("The first purpose [of Title II] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 84, 151 (1990) (House Report) (similar); *id.*, Pt. 3, at 50 (similar).

tion of justice, including courts and correctional institutions." And the preamble's discussion of Section 35.130, which sets forth the general substantive prohibitions against discrimination, notes that a public entity may be required to provide assistance to individuals with disabilities "where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. Pt. 35, App. A, at 478. The Department's Title II Technical Assistance Manual, published in accordance with Section 12206 of the ADA, specifically lists "[j]ails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA, must be designed and constructed so that they are accessible to and usable by individuals with disabilities. Title II Technical Assistance Manual at II-6.0000, II-6.3300(6).[2]

3. Respondent was committed by a Pennsylvania court to petitioners' custody for a term of 18-36 months. (Respondent has sued various individuals as well as the Department of Corrections, but for simplicity, we refer in this brief to the Department as "petitioners.") The sentencing court recommended that respondent be placed in petitioners' Motivational Boot Camp program for first-time offenders; respondent's successful completion of that program would have led to his release on parole in six months. Petitioners determined, however, that respondent was ineligible for the Boot Camp program because of a medical history of hypertension. J.A. 6-7.

[2] By statute, the Department of Justice's regulations must include standards for facilities consistent with minimum guidelines established by the federal government's Architectural and Transportation Barriers Compliance Board (Access Board), which was established by the Rehabilitation Act. 42 U.S.C. 12134(c); see 42 U.S.C. 12204(a); 29 U.S.C. 792. The Department's regulations provide that public entities building new facilities or altering existing ones may follow either the Uniform Federal Accessibility Standards (UFAS) or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), established by the Access Board. 28 C.F.R. 35.151(c); see 41 C.F.R. 101-19.6, App. A; 28 C.F.R. Pt. 36, App. A. The UFAS lists jails, prisons, reformatories and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. 101-19.6, App. A, at 154. Recent amendments to the ADAAG include specific accessibility guidelines for detention and correctional facilities. 63 Fed. Reg. 2000, 2009-2013 (1998). The Access Board adopted those amendments as a final rule in 1998. *Id.* at 2000. As adopted by the Access Board, they provide guidance to the Department of Justice in establishing accessibility standards under Title II. See *ibid.*; 42 U.S.C. 12134(c); 12204(a). The Department of Justice has proposed adoption of the amendments. 59 Fed. Reg. 31,808 (1994).

While still in custody, respondent brought this action, alleging that petitioners had violated the ADA's anti-discrimination mandate by refusing to allow him to participate in the Boot Camp program based upon his disability. J.A. 7-8. The district court dismissed the complaint for failure to state a claim based on petitioners' "threshold argument that the ADA does not apply to state prisons." J.A. 98.

The court of appeals reversed. J.A. 122-134. Following Congress's "direct[ion] that Title II of the ADA be interpreted in a manner consistent with Section 504," the court concluded that the language of both statutes "clearly encompasses" prisons, J.A. 124. That conclusion, the court stated, was "bolstered" by the Department of Justice's regulations applying both statutes to prisons and other correctional facilities, which regulations must be accorded "controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute." J.A. 126 (internal quotation marks omitted). The court rejected contrary decisions suggesting that Congress was required to refer specifically to state prisons in order to make the ADA applicable in that context: "[i]n light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms 'any' and 'all.'" J.A. 130. Finally, the court rejected petitioners' contention that prisoners cannot be "qualified individual[s] with a disability" under Title II because they are incarcerated involuntarily; that phrasing, it held, does not

"imply voluntariness or mandate that an individual seek out or request a service to be covered"; rather, it "describes those who are fitted or qualified to be chosen, without regard to their own wishes." J.A. 131 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The anti-discrimination provision of Title II of the Americans with Disabilities Act (ADA), covering public entities, 42 U.S.C. 12132, applies to state prisons. The plain language of the ADA compels that conclusion; Title II prohibits discrimination on the basis of disability by any "public entity," which is defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." That language is clearly calculated to be all-encompassing. Moreover, other provisions of Title II, prohibiting exclusion on the basis of disability from the "benefits" of any "services, programs, or activities" furnished by a public entity, and limiting protections to "qualified individuals with a disability," cannot be reasonably read to exclude prisoners as a categorical matter from the scope of the ADA.

The clear-statement rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), does not suggest that prisoners are not covered by Title II. That decision construed a statute that was ambiguous as to its coverage of the state judiciary to exclude such coverage, in the absence of a clear intent by Congress to include such a fundamental aspect of the state's governmental structure within the federal regulatory scheme. *Gregory* is inapplicable here because the ADA unambiguously covers every state entity, necessarily including prisons. *Gregory* does not require Congress to list every possible application of a federal statute to state governmental functions, nor does it permit a court to write exceptions to unambiguous legislation.

Coverage of state prisons is consistent with Congress's intent that Title II read at least as broadly as Section 504

of the Rehabilitation Act of 1973, which prohibits disability-based discrimination by recipients of federal financial assistance and in federally conducted activities. When Congress enacted the ADA, it was presumptively aware of administrative and judicial applications of Section 504 to state prisons. Title II should therefore be read to cover state prisons as well.

Application of Title II to state prisons is also supported by the Department of Justice's implementing regulations, which were authorized by Congress. Those regulations recognize the statute's application to state prisons and designate the Department of Justice as the federal agency responsible for monitoring state prison agencies' compliance with Title II. Even if Title II were ambiguous as to the coverage of state prisons, the Department's regulations would be controlling on the question, for they are at a minimum consistent with the statute, and so are entitled to deference.

There is no support for petitioners' contention that application of Title II to state prisons is inconsistent with the statute's purpose of integrating persons with disabilities into the mainstream of American society. Indeed, the particular program to which respondent sought access had the precise purpose of facilitating prisoners' reentry into mainstream society. And petitioners' arguments about the burdens of compliance with the ADA go to the wisdom of the legislation, not its applicability, and are in any event overstated.

Finally, application of Title II to programs provided by state prisons for their prisoners raises no serious constitutional questions. Petitioners object only to Title II's application to such programs; they do not dispute its application to state entities *generally*, or even to state prisons in their treatment of employees and visitors, as a valid exercise of Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment, by deterring and remedying discrimination against persons with disabilities by state and local actors. There was

ample basis for Congress to conclude that such discrimination is a serious and pervasive problem throughout society, infecting governmental decisionmaking, and that deterrence and remedies against such discrimination were necessary. Title II is a proportionate and flexible response to that problem of discrimination, for it requires only reasonable modifications of public programs to accommodate the disabled and does not require a State to assume undue expenditures or burdens. And, unlike the situation in *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), there is no reason to believe that Congress enacted Title II out of displeasure with, or to overturn, this Court's constitutional holdings concerning discrimination against persons with disabilities. Congress's power to enforce the Equal Protection Clause is sufficient to deter and remedy discrimination against disabled persons inside prison as well as outside. Prisoners may claim the benefit of the Equal Protection Clause, for they do not lose all constitutional rights as a result of their incarceration. Moreover, Congress identified a need to deter and remedy irrational discrimination against the disabled in prison.

ARGUMENT

THE ANTI-DISCRIMINATION PROVISION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT APPLIES TO STATE PRISONS

A. The Plain Language Of Title II Applies To State Entities That Operate Prisons

The starting point in the question of statutory construction before the Court is, as always, the language of the statute. *United States* v. *Gonzales*, 117 S. Ct. 1032, 1034 (1997). In this case, the statutory text is dispositive of the question, for it unambiguously provides that Title II applies to state prisons. Title II provides that no person shall be subject to discrimination on the basis of disability by a "public entity." 42 U.S.C. 12132. The statute defines the term "public entity" to include "any State or local government" and "any department, agency, special purpose

district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131. It is difficult to conceive of a more comprehensive definition of the public entities to which Title II applies. Title II plainly uses the word "any" in its ordinary "expansive" sense, *i.e.*, "one or some indiscriminately of whatever kind." *Gonzales*, 117 S. Ct. at 1035 (construing "any term of imprisonment" to mean "all 'term[s] of imprisonment,'" where the statute did not contain any language limiting the breadth of the word "any").

In the face of this all-inclusive statutory definition, petitioners suggest a number of limitations to the scope of Title II, all of which are without foundation in the text. First, petitioners suggest (Br. 12) that the statute is ambiguous because it does not specifically mention prisons in the definition of "public entity," or elsewhere in Title II or the ADA. No specific mention of prisons was necessary in light of the all-encompassing nature of the definition itself. Having said that the statute should apply to "any State" or "any department, agency, special purpose district, or other instrumentality of a State," Congress was entitled to expect that it would be applied to all such entities without exception.

Second, petitioners suggest (Br. 20) that Section 12132 does not apply to prisons because (they contend) it prohibits only discriminatory denial of the "benefits" of "services, programs, or activities," 42 U.S.C. 12132, which should not be construed to include correctional functions. That contention is incorrect for several reasons. First, the premise of the argument is wrong, for the anti-discrimination principle of Title II is not limited to the discriminatory exclusion of individuals from, or denial of the benefits of, "services, programs, or activities." Title II also provides that no qualified person with a disability shall "be subjected to discrimination by any such [public] entity." 42 U.S.C. 12132. Thus, whether or not prisons provide "services, programs, or activities," they are prohibited from discriminating on the basis of disability by

the concluding clause of Section 12132, a "catch-all phrase that prohibits all discrimination by a public entity." *Innovative Health Sys.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997). Cf. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 520-521 (1982) (Title IX of Education Amendments of 1972).

Furthermore, even if Title II prohibited only discrimination in "services, programs, and activities," petitioners' argument would still fail, for those terms are easily read to include correctional functions such as eligibility determinations for a special correctional program like Pennsylvania's Boot Camp program. "Program" means "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Webster's Third New International Dictionary* 1812 (1986). "Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an organizational unit for performing a specific function." *Id.* at 22. Certainly, the boot camp program at issue here is a part of petitioners' execution of a "system" designed to accomplish a "desired goal," and operating that program falls within petitioners' "duties or functions." Indeed, Pennsylvania's Motivational Boot Camp Act defines the term "motivational boot camp" as a "program" and uses the word "program" repeatedly throughout the statute.[3]

Nor could prisoners be categorically excluded from the protection of Title II on the theory that incarceration is not the "benefit" of a service, program, or activity.

[3] The statute defines "Motivational boot camp" as "[a] program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, ventilation therapy, continuing education, vocational training and prerelease counseling." Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997); see also *id.* § 1124(b) (referring to a defendant's eligibility for "a motivational boot camp program"); *id.* § 1125 (entitled "[e]stablishment of motivational boot camp program"); *id.* §§ 1126, 1127.

Whether or not incarceration itself is a "benefit," incarcerated prisoners are granted or denied many benefits by their custodians. In this case, for example, respondent's successful completion of boot camp would have led to his early release from prison, a "benefit" by any common understanding of the term. Similarly, programs such as work-release, education programs, and parole provide "benefits" to prisoners. And in any event, Section 12132 prohibits the discriminatory "exclu[sion]" of persons with disabilities "from participation in" services, programs, and activities, as well as the discriminatory denial of their "benefits." There is no need, therefore, to decide whether prison programs provide "benefits," for it is sufficient that respondent has alleged that he was denied the opportunity to "participate in" the motivational boot camp program. J.A. 7.

Third, petitioners erroneously suggest (Br. 20) that a prisoner can never be a "qualified individual with a disability." Section 12131(2) defines that phrase to mean "an individual with a disability who * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Nothing in that definition excludes prisoners *per se*. Drawn from the Department of Justice's Rehabilitation Act regulations, the definition simply makes clear that public entities need not discard the essential eligibility requirements of their programs or activities in order to comply with the ADA. H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, at 38 (1990) (House Report); see 28 C.F.R. 41.32; *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979).

Petitioners argue (Br. 20) that the terms "eligible" and "participate" in the statutory definition of "qualified individual with a disability" connote voluntariness on the part of an applicant who seeks a benefit from the State and therefore exclude prisoners, who are incarcerated against their will. That reading of the statute, however, could also exclude schoolchildren and jurors, among others, from the

ADA's protections; it is also inconsistent with Congress's specific determination that the ADA was necessary because discrimination against persons with disabilities persists in "institutionalization." 42 U.S.C. 12101(a)(3). And even if prisoners are sentenced and incarcerated against their will, their participation in many correctional programs, such as work-release and education programs, may well be voluntary; respondent, for example, voluntarily sought to participate in the boot camp program. Moreover, the statutory terms are not so restrictive as petitioners suggest. "Eligible" describes those who are "fitted or qualified to be chosen," *Webster's Third New International Dictionary* 736 (1986), while "participate" simply means "to take part in something," *id.* at 1646. Not surprisingly, therefore, the statutory authorization for the boot camp program at issue here defines, at length, the qualifications of an "[e]ligible inmate" who may be selected for "participat[ion]" in the boot camp program.[4]

B. The "Clear Statement" Rule Of *Gregory* v. *Ashcroft* Has No Application To This Case

Relying on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), petitioners argue (Br. 11-22) that Title II should not be interpreted to apply to state prisons because Congress did not state *in haec verba* that the statute applies to prisons. That argument misapprehends the role of the "clear statement" rule articulated in *Gregory*, which is "a rule of statutory construction to be applied where statutory intent is ambiguous." 501 U.S. at 470. In *Gregory*, the Court examined an ambiguous exception to the Age Discrimination in Employment Act of 1967 (ADEA), which

[4] The term "eligible inmate" appears throughout the Motivational Boot Camp Act, as do references to inmate "participants." See, *e.g.*, Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997) (defining "[e]ligible inmate" for "participation in the motivational boot camp program"); *id.* § 1124 (entitled "[s]election of inmate participants"); *id.* § 1126(a) ("eligible inmate may make an application" to "participate in the motivational boot camp program").

expressly applies to States as employers, see 29 U.S.C. 630(b)(2), but also excludes from its protections "any person elected to public office in any State * * * or an appointee on the policymaking level," 29 U.S.C. 630(f). The issue in *Gregory* was whether that exception applied to state judges who were appointed to office by the Governor and subject to retention election. 501 U.S. at 465. The Court concluded that the ADEA was "at least ambiguous" as to whether the judges were included within the exception. *Id.* at 467. Determining that it should "not attribute to Congress an intent to intrude on state governmental functions" such as the state judiciary without an unambiguous expression of that congressional intention, *id.* at 470, the Court declined to read the ADEA to cover state judges "unless Congress made it clear that judges are *included*." *Id.* at 467.

Gregory involved the construction of an ambiguous statute; it did not create a directive to write exceptions into unambiguous acts. See *Salinas* v. *United States*, 118 S. Ct. 469, 475 (1997). Unlike the situation in *Gregory*, there is no ambiguous exception in Title II to be construed, for Congress straightforwardly made all operations of public entities subject to the ADA. Moreover, *Gregory* does not require that Congress spell out each governmental operation that is made subject to federal legislation. Such a rule would be unworkable in practice, and would make pointless Congress's effort to ensure broad coverage of statutes like the ADA by employing all-encompassing statutory definitions of the public entities covered by the Act. Indeed, the Court stated in *Gregory* that the "clear statement" rule "does not mean that the Act must mention judges explicitly[;] * * * [r]ather, it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467. That requirement is fully satisfied by the ADA, which is expressly applicable to all public entities, defined in turn to include every agency of state or local government.

C. Congress Directed That Title II Be Applied As Broadly As The Rehabilitation Act Of 1973, Which Had Been Consistently Applied To State Prisons Before The ADA's Enactment

Congress repeatedly provided that the ADA be interpreted at least as broadly as Section 504 had been construed at the time of the ADA's enactment. Title II of the ADA states that rights and remedies under the two statutes are *in pari materia*, see 42 U.S.C. 12133, and requires that the Department of Justice's ADA regulations be consistent with the federal government's existing coordination regulations governing Section 504, see 42 U.S.C. 12134(b). Title IV also requires that nothing in the ADA be construed to apply a lesser standard than that applicable under Section 504 or its implementing regulations, see 42 U.S.C. 12201(a). In language closely similar to that of Title II, Section 504 provides that no otherwise qualified individual with a disability (before the ADA, a "handicap") shall on that basis "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" receiving federal financial assistance or conducted by the federal government. 29 U.S.C. 794(a). The legislative history of the ADA amply demonstrates that Congress intended at a minimum to extend the protections of Section 504 to all public entities, whether or not they received federal funds. See p. 3, *supra*.

At the time of the ADA's enactment, it was well established that Section 504 covered both state and federal prisons. The Department of Justice's regulations implementing Section 504 in the context of programs receiving financial assistance from the Department defined (and still define) "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections." 28 C.F.R. 42.540(h). Those regulations also defined "benefit" to include "provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, *sentencing*, *confinement*, or other prescription of conduct)." 28 C.F.R. 42.540(j) (emphasis added). The appendix to those regulations stated further that services and programs provided by federally assisted "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities" are covered by Section 504, and that those facilities designated for use by persons with disabilities are "required to make structural modifications to accommodate detainees or prisoners in wheelchairs." 45 Fed. Reg. 37,620, 37,630 (1980).

The Department's Section 504 regulations for programs conducted by the Department itself similarly cover federal correctional facilities. See 28 C.F.R. 39.170(d)(1)(ii) (Section 504 complaint procedure for inmates of federal penal institutions); *id.* Pt. 39, Editorial Note, at 685 (Section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Federal Bureau of Prisons), 686 (federally conducted program is "anything a Federal agency does"). Those regulations are particularly authoritative on the coverage of Section 504, for they were submitted to authorizing committees of the House and the Senate in 1984, pursuant to 29 U.S.C. 794(a), after Section 504 was amended to cover federally conducted programs. See 28 C.F.R. Pt. 39, Editorial Note, at 685; see also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273 (1987).

The administrative construction of Section 504 was confirmed by pre-ADA judicial decisions recognizing that statute's application in the context of litigation brought by state prisoners. See *Bonner* v. *Lewis*, 857 F.2d 559, 562 (9th Cir. 1988); *Journey* v. *Vitek*, 685 F.2d 239, 242 (8th Cir. 1982); *Sites* v. *McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W.Va. 1976). Given that weight of authority (and the absence of any contrary authority at the time of the ADA's enactment), Congress should be deemed to have

codified Section 504's application to state prisons when it enacted the ADA. "It is always appropriate to assume that our elected representatives * * * know the law," and in this case, because of the ADA's "repeated references" to Section 504, it is especially appropriate to conclude that Congress extended Title II to state prisons. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). A contrary ruling could not be squared with Congress's insistence that the courts and the Executive Branch apply the ADA at least as broadly as they had applied Section 504.

D. Administrative Implementation Of Title II Also Supports Its Application To State And Local Prisons

As we have explained above (pp. 3-4, *supra*), Congress delegated to the Department of Justice the authority to promulgate regulations implementing Title II and the responsibility to provide technical assistance to public entities covered by the ADA. 42 U.S.C. 12134(a), 12206. The Department has construed Title II to apply to state prisons, and petitioners do not contend otherwise. See p. 4, *supra*. In light of Congress's express delegation to the Department of Justice of the authority to make legislative-type rules implementing the ADA, the Department's construction of Title II must be accorded "controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys.* v. *NLRB*, 510 U.S. 317, 324 (1994) (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).[5]

[5] Pursuant to its enforcement authority under both Title II and Section 504, the Department of Justice has entered into administrative settlement agreements with public entities that operate jails and prisons, to resolve complaints of discrimination on the basis of disability. We are lodging several examples of those settlement agreements with the Clerk and providing them to counsel for petitioners. Department of Justice records indicate that, during Fiscal Year 1997, the Department received 749 complaints of violations of Title II, of which 114 involved prisons.

Petitioners do not contend that the Department's interpretation of Title II to apply to state prisons is *contrary* to the statute. They argue, rather, that the statute is ambiguous as to its application to state prisons, and therefore it should be construed not to apply in that context, notwithstanding the definitive administrative interpretation, because that construction "would upset the usual [federal-state] constitutional balance." Pet. Br. 21-22. There is no support for petitioners' argument that an agency's otherwise permissible construction of a statute pursuant to an express delegation by Congress should be denied deference because it may affect the operation of some aspects of state governments. This Court has made clear, for example, that a federal agency acting within the scope of its congressionally delegated authority may preempt state law, even in the absence of any express congressional authorization for such preemption. See *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 154 (1982); *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988). When an agency's preemption decision is challenged, the question for the courts is whether that decision represents a permissible implementation of the statute, not whether Congress itself has manifested any intent that state law be preempted. *Id.* at 64. That is so even though this Court will not conclude that *Congress* has preempted state law "unless that was [its] clear and manifest purpose." *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). In a similar fashion, the Justice Department's permissible construction of Title II to apply to state prisons is controlling in this case.

Petitioners' argument that *Gregory* v. *Ashcroft*, *supra*, prevents the Court from deferring to that construction is without merit. The Court concluded in *Gregory* that an ambiguous provision of the ADEA should not be construed to apply to state judges in the absence of a clear statement from Congress to that effect. 501 U.S. at 467. The Court's decision did not address any question of deference, and

the Equal Employment Opportunity Commission (EEOC), which enforces the ADEA, did not request deference to its previous litigating position that the ADEA applied to state judges. The dissenting Justices in *Gregory* disagreed among themselves whether the EEOC's litigating position deserved deference, see *id.* at 485 n.3 (opinion of White, J.), 494 (Blackmun, J., dissenting). This case, however, does not involve only a litigating position on the part of the agency charged with implementation of a statute, but rather the Department of Justice's definitive construction of Title II pursuant to an express delegation to implement legislative rules. That construction is entitled to deference under standard principles of administrative law reflected in *Chevron*, and establishes that Title II applies to state prisons.

E. Petitioners' Policy-Based Arguments Are Unpersuasive

Petitioners advance a number of arguments intended to demonstrate that Congress would likely not have intended Title II to apply to state prisons. First, they suggest (Br. 5, 13-14) that the ADA generally is aimed at the integration of persons with disabilities into mainstream society, which purpose (they suggest) is not advanced by affording protection against discrimination to prisoners during their incarceration. There is no inconsistency, however, between a policy of ending societal segregation of the disabled and one of protecting disabled prisoners against discrimination. Even if prisoners are sentenced under a system that does not expressly recognize rehabilitation as a penological goal, Congress might well conclude that society has an interest in their obtaining access on a nondiscriminatory basis to whatever services, programs, and activities might be available to prepare them for life outside prison. Most prisoners must, at some point, return to the mainstream of American life. Congress could surely have intended that prisoners with disabilities not be punished *more* than other prisoners because of their

disability, and be *more* disadvantaged than other prisoners upon their return to society. This case presents an excellent example of such a situation, for the Boot Camp program is intended to strengthen first-time offenders' connection to mainstream society; there is no evident reason why offenders with disabilities, as a class, should be deemed unable to benefit from such a program.

Second, petitioners emphasize (Br. 14-15) the supposed onerousness of the ADA's nondiscrimination and accommodation requirements. It bears emphasis, however, that federal prisons and all state and local correctional institutions receiving federal assistance have long been subject to similar requirements under Section 504, and yet petitioners have pointed to no avalanche of litigation arising under Section 504 or disruption of legitimate correctional objectives resulting from its application to the States. There is no evident reason to believe that prisons' experience under the ADA will be more drastic. The ADA may require adjustments and flexibility in the administration of some prison programs—as Section 504 also requires—but the same might be said of the statute's application to school systems, public transportation systems, private employment, and public accommodations. Congress did not enact the ADA lightly, and petitioners' arguments based on burdensomeness are really a policy-based plea for an exemption, which should be made in a different forum.

F. Application Of Title II To State Prisons Does Not Raise Any Serious Constitutional Questions

Petitioners argue for the first time in this Court (Br. 22-32) that Title II should be read to exclude prisoners from coverage because Congress lacks the constitutional authority to prohibit discrimination against disabled state prisoners.[6] As we have explained, there is no language in

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[6] Petitioners did not raise that contention in either court below, see J.A. 13-16 (motion to dismiss); J.A. 103-119 (appellate brief), nor was the argument addressed by the court of appeals. This Court has stated

Title II that can be "construed" to create a state-prison exception. And although this Court does construe ambiguous statutes to avoid serious constitutional questions, that practice does not warrant the rewriting of unambiguous legislation. See *Salinas*, 118 S. Ct. at 475; *Almendarez-Torres* v. *United States*, No. 96-6839 (Mar. 24, 1998), slip op. 13-14.

In any event, there are no serious constitutional questions raised by application of Title II in the state prison context. Quite significantly, petitioners do not challenge Congress's authority under the Fourteenth Amendment to apply the ADA to the States *generally*, or even to prisons vis-à-vis employees or visitors (see Pet. 11); they contend only that Title II cannot be applied to one particular state function, the prison system's treatment of its prisoners. As we explain below, the application of the ADA to public entities, including state prisons, is authorized by Section 5 of the Fourteenth Amendment.[7]

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that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Although that rule might be broad enough to permit petitioners to argue in this Court that Title II should be construed to avoid an unconstitutional result, in our view it is not broad enough for them to argue that Title II is actually unconstitutional, should the Court agree with our submission that Title II unambiguously applies to state prisons. Petitioners did not argue in the lower courts that Title II is unconstitutional, nor does the question presented by the certiorari petition ("Does the Americans with Disabilities Act apply to inmates in state prisons," Pet. i) fairly include a constitutional question. Had the constitutionality of Title II been drawn in question in this case, the courts would have invited the United States to intervene as a party to defend the statute, pursuant to 28 U.S.C. 2403(a). Accordingly, any claim that Title II is unconstitutional is not properly before the Court. See *Yee* v. *City of Escondido*, 503 U.S. 519 (1992).

[7] Because Congress's power under the Fourteenth Amendment is sufficient to sustain Title II, we do not address petitioners' Commerce Clause arguments in detail. To the extent, however, that petitioners rely on cases such as *Printz* v. *United States*, 117 S. Ct. 2365 (1997),

1. Section 5 of the Fourteenth Amendment is "a positive grant of legislative power to Congress." *City of Boerne* v. *Flores*, 117 S. Ct. 2157, 2163 (1997) (internal quotation marks omitted). Under Section 5, Congress may act to enforce the Equal Protection Clause of the Fourteenth Amendment in order to "deter[] or remed[y] constitutional violations * * * even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Ibid.* (internal quotation marks omitted). Although Congress does not have the authority to "decree the substance of the Fourteenth Amendment's restrictions on the States," it "must have wide latitude in determining" where to draw "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 2164.

"It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *City of Boerne*, 117 S. Ct. at 2172 (internal quotation marks and brackets omitted). Congress is, moreover, "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting Sys.* v. *FCC*, 117 S. Ct. 1174, 1189 (1997) (citations and internal quotation marks omitted). Accordingly,

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and *New York* v. *United States*, 505 U.S. 144 (1992), that reliance is misplaced, for those cases are plainly inapposite. Title II does not require "the forced participation of the States' executive in the actual administration of a federal program." *Printz*, 117 S. Ct. at 2376. Rather, Title II simply forbids States from discriminating against the disabled in their provision of services, just as it prohibits private employers and places of public accommodation from engaging in such discrimination. See 42 U.S.C. 12112, 12182. Second, because Congress enacted Title II pursuant to its Fourteenth Amendment powers, the principles of federalism reflected in the Tenth Amendment and cases such as *Printz* have little relevance here. See *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976).

legislation will be upheld as a valid exercise of Congress's Section 5 power if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. Title II readily satisfies that test.

2. Title II is a proportionate response to the problem of discrimination against persons with disabilities, which Congress reasonably found to be serious and pervasive. As an initial matter, there can be no serious dispute that irrational and invidiuous discrimination on the basis of disability violates the Equal Protection Clause. In *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985), this Court held unconstitutional the application of a zoning ordinance to deny a special use permit for the operation of a group home for mentally disabled persons. A majority of the Court recognized that "through ignorance and prejudice [persons with mental disabilities] have been subjected to a history of unfair and often grotesque mistreatment." *Id.* at 454 (Stevens, J., concurring) (internal quotation marks omitted); see *id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part). The Court also recognized that "irrational prejudice," *id.* at 450, "irrational fears," *id.* at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," *id.* at 465 (Marshall, J.), existed against persons with disabilities in society at large and at times infected government decisionmaking.

In enacting Title II, Congress reasonably concluded that "appropriate legislation" under Section 5 of the Fourteenth Amendment was necessary to remedy and deter unconstitutional discrimination against the disabled. First, the legislative record amply demonstrated pervasive, "society-wide discrimination" against the disabled based on fear and stigma that infects both public and private services. See S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989) (Senate Report); 42 U.S.C. 12101(a)(2)

(discrimination a "serious and pervasive" problem).[8] After 14 congressional hearings, 63 field hearings, the submission of myriad reports by the Executive Branch and interested groups, and lengthy floor debates,[9] Congress found that persons with disabilities have been subject to "a history of purposeful unequal treatment," 42 U.S.C. 12101(a)(7), and that this discrimination "persists" in many areas, including "public services," 42 U.S.C. 12101(a)(3). Congress also found that this discrimination includes "outright intentional exclusion, * * * overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, [and] segregation." 42 U.S.C 12101(a)(5). As a result of that discrimination, Congress found, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

These findings are "reasonable inferences based on substantial evidence." *Turner Broadcasting*, 117 S. Ct. at 1189 (internal quotation marks omitted). The evidence before Congress demonstrated that persons with disabili-

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[8] The committee reports accompanying the ADA demonstrate that Congress found considerable need to prevent discrimination against disabled persons by public entities, in particular. See Senate Report 7 (public schools), 12 (voting), 19, 44 (citing need to extend protection to state agencies that do not receive federal aid), 45 (school bus operations); House Report, Pt. 2, at 30 (zoos, public schools); 37, 84 (public services, generally); *id.* Pt. 3, at 50 (jails).

[9] The principal hearings, reports, and studies that formed the basis for Congress's conclusion in the ADA that irrational discrimination against the disabled is a serious and pervasive problem are cited at *Coolbaugh* v. *Louisiana*, No. 96-30664, 1998 WL 84123, at *6, *12 n.4 (5th Cir. Feb. 27, 1998), and Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991). Congress also legislated against a background of 30 years' experience with other statutes enacted to protect the disabled against discrimination. See Lowell P. Weicker, *Historical Background of the Americans with Disabilities Act*, 64 Temp. L. Rev. 387, 387-389 (1991).

ties were excluded from public services and accommodations for no reason other than distaste for or fear of their disabilities. See Senate Report 7-8 (citing instances of discrimination based on negative reactions to sight of disability); House Report, Pt. 2, at 28-31 (same). The legislative record documented instances of exclusion of persons with disabilities from "a whole panoply of services because of simple prejudice." See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 408 (1991); *id.* at 412-414 (discussing widespread state-imposed segregation of persons with disabilities). After a thorough survey of the available data, the U.S. Commission on Civil Rights documented that prejudice against persons with disabilities manifested itself in many ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 23-26 (1983); see Senate Report 21. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7). In light of this evidence and these findings about pervasive discrimination against persons with disabilities, the broad applicability of the ADA, including its application to public entities in Title II, is proper.

Second, the statute's remedial provisions are a measured response to the evil identified. Unlike the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* (RFRA), at issue in *City of Boerne*, *supra*, which required States to provide exemptions to their legitimate regulations for religious practices unless they could demonstrate that those regulations were the least restrictive alternative necessary to promote a compelling interest, the ADA requires only "reasonable modifications" that do

not entail a "fundamental[] alter[ation in] the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). Under the Department of Justice's implementing regulations, public entities generally need not provide accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3). A similar rule of reason is found in the Department's Section 504 regulations, of which Congress is presumed to have been aware when it enacted the ADA. See 28 C.F.R. 39.150(a)(2), 41.53. Thus, while the ADA's nondiscrimination provision and reasonable-accommodation requirement do impose some burdens on the States, and while there is bound to be disagreement in some cases over the extent of the modification to a program that must be made to accommodate persons with disabilities, the statutory scheme acknowledges countervailing interests as well.

Furthermore, Congress concluded, based on the record before it, that a particularly serious form of discrimination facing the disabled was the use of blanket exclusionary rules based ultimately on unexamined stereotypes, fear, and prejudice.[10] Even if some of those blanket rules, when applied by public entities, might survive rational-basis constitutional review, it was within Congress's power to conclude that, because those rules might actually be based on gross overgeneralizations and stereotypes about persons with disabilities rather than legitimate regulatory objectives, they should receive closer scrutiny under the statute. Cf. *Katzenbach* v. *Morgan*, 384 U.S. 641, 654 (1966) (although literacy tests might serve legitimate interests, "Congress might well have questioned * * * whether these were actually the interests being served" and therefore could constitutionally suspend them).

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[10] See 42 U.S.C. 12101(a)(5); Senate Report 7 (decrying discrimination "based on false presumptions, generalizations, [and] misperceptions"), 9 (similar); House Report, Pt. 2, at 30 (similar), 33 (discrimination from "use of standards and criteria" and "presumptions, stereotypes and myths"), 40 (similar); *id.* Pt. 3, at 25 (similar).

Finally, unlike the background to RFRA—which demonstrated that Congress acted out of displeasure with this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), declaring the substance of the Free Exercise Clause—there is no evidence that Congress enacted the ADA because of its disagreement with any decision of this Court applying any particular constitutional standard to claims by persons with disabilities. And whereas the principal effect of RFRA was to establish a new rule of decision to be applied by the courts in constitutional litigation in place of the *Smith* rule, Title II takes a quite different approach, establishing an administrative enforcement mechanism to investigate claims of discrimination against the disabled, as well as authorizing a cause of action to redress discrimination.

Moreover, this Court has recognized that legislative remedies are particularly appropriate for persons with disabilities. In *City of Cleburne*, the Court declined to deem classifications based on disability as suspect or "quasi-suspect" in part because heightened constitutional scrutiny could unduly limit legislative solutions to problems faced by the disabled. 473 U.S. at 450. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task to legislators guided by qualified professionals." *Id.* at 442-443. It pointed to legislation such as Section 504, intended to protect persons with disabilities, and expressed concern that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [them] to refrain from acting at all." *Id.* at 444. That concern demonstrates the propriety of Congress's enactment of the ADA as a vigorous yet flexible response to the pervasive but complex problem of discrimination against persons with disabilities.

3. Petitioners contend (Br. 25-32) that Title II must be construed not to apply to state prisoners because, if it did so apply, then it would exceed Congress's powers to

enforce the Fourteenth Amendment. There is nothing talismanic about state prison operations, however, that places them outside the legitimate scope of Congress's Fourteenth Amendment power. Even though prisoners give up many of their civilian rights when they are incarcerated, see *Sandin* v. *Connor*, 515 U.S. 472, 485 (1995), and courts "accord deference to the appropriate prison authorities" in addressing prisoners' claims of constitutional violations, *Turner* v. *Safley*, 482 U.S. 78, 85 (1987), the Court has made clear that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 84; see *Sandin*, 515 U.S. at 485; *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556 (1974). "It is settled that a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Turner*, 482 U.S. at 95 (internal quotation marks omitted).

Prisoners with disabilities are therefore protected from irrational and invidious discrimination by the Equal Protection Clause, and Congress has the power under the Fourteenth Amendment to deter and remedy such discrimination. In our view, Congress's conclusions about the need for deterrence and remedies against discrimination against disabled persons generally is sufficient to bring prisons within the legitimate scope of the ADA; but the legislative record demonstrates that Congress identified a problem of irrational discrimination against disabled persons specifically in the law enforcement system, such that deterrence and remedies in that context were thought necessary. See House Report, Pt. 3, at 50 (noting that persons with disabilities, including those with epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail," and stating that

"[s]uch discriminatory treatment based on disability can be avoided by proper training").[11]

Moreover, nothing in the ADA is inconsistent with the need to consider an inmate's status as a prisoner, or the legitimate penological needs of the institution in which the inmate is incarcerated. Protections under Title II are limited to individuals who can meet the "essential eligibility requirements" of the relevant program or activity, with or without "reasonable modifications." 42 U.S.C. 12131(2). Nor would the ADA give inmates with disabilities the "right" to participate in programs such as the boot camp program at issue here. It would simply give inmates with disabilities the right not to be impermissibly excluded from such programs on the basis of their disability. Cf. *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-284 (1977) (even though plaintiff could be fired for no reason at all, he may not be fired for an unconstitutional reason). Because of the posture of this case, the precise application of those concepts in the prison context is not before the Court, but whatever standard is to be applied to inmates' claims under Title II of the ADA, the court of appeals correctly held that it protects prisoners from discrimination on the basis of disability.

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[11] See also *Accommodating the Spectrum of Individual Abilities*, *supra*, at 168 (describing "major types of areas of discrimination" against disabled in criminal justice system, including "inadequate ability to deal with physically handicapped accused persons and convicts (*e.g.* accessible jail cells and toilet facilities)"; *Americans With Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. 77 (1988) (testimony of Belinda Mason, describing incident in which arrestee with HIV was locked inside his car overnight); *Joint Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Educ. and Employment Opportunities of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. 63 (1989) (testimony of Justin Dart, describing experience of disabled persons arrested and held in jail).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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